

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

RECEIVED

JUN 11 1997

Federal Communications Commission
Office of Secretary

In the matter of)

Advanced Television Systems)
and Their Impact upon the)
Existing Television Broadcast)
Service)

MM Docket No. 87-268

DOCKET FILE COPY ORIGINAL

To: The Commission

PETITION FOR RECONSIDERATION

Three Feathers Communications, Inc. ("Three Feathers"), the permittee of a new television broadcast station on Channel 36 at Hutchinson, Kansas, by its attorneys, hereby requests that the Commission reconsider its decision in the Fifth Report and Order in the above-captioned rulemaking proceeding (FCC 97-117, released April 21, 1997) ("*Fifth Report and Order*"), to the extent that Three Feathers was excluded from the list of television station licensees and permittees that are eligible for DTV licenses. In support of this Petition for Reconsideration, Three Feathers states the following:

1. Three Feathers is the permittee for a new television broadcast station on Channel 36 at Hutchinson, Kansas. The Mass Media Bureau's Video Services Division granted Three Feathers' construction permit on April 2, 1997. See Letter from Barbara A. Kreisman, Chief, Video Services Division, Mass Media Bureau, FCC File No. BPCT-950703KE (April 2, 1997) (a copy of which is attached hereto).

2. In the *Fifth Report and Order*, the Commission defined those eligible for DTV licenses as parties that "as of the date of issuance of the initial [DTV] licenses, hold a license

No. of Copies rec'd
List A B C D E

0414

to operate a television broadcast station or a permit to construct such a station, or both.” *Fifth Report & Order* at ¶ 13. In paragraph 68 of the *Fifth Report & Order*, the Commission formally issued DTV licenses to those eligible broadcasters that were listed as Appendix E to the order.

3. Although Three Feathers held a construction permit for a new television broadcast station on Channel 36 at Hutchinson, Kansas, both on the adoption date and on the release date of the *Fifth Report & Order*, and, therefore, met the Commission’s definition for a party eligible to receive a DTV license, it was not listed on Appendix E to the *Fifth Report & Order*. Moreover, at Table 1 to Appendix B to the Sixth Report & Order in the above-captioned rulemaking (FCC 97-115, released April 21, 1997), the Commission listed channel 36 at Hutchinson, Kansas as receiving a DTV channel allotment.

4. Three Feathers believes that the FCC’s failure to include it on the list of parties eligible to receive DTV licenses found at Appendix E to the *Fifth Report & Order* was an oversight. Therefore, by means of this Petition for Reconsideration, Three Feathers requests that the Commission take appropriate steps to remedy this situation.

5. In light of the foregoing, Three Feathers respectfully requests that Appendix E to the Commission’s *Fifth Report & Order* be corrected to include and list Three Feathers as the permittee for a new television broadcast station on Channel 36 at Hutchinson, Kansas, and, therefore, as eligible to receive a DTV license.

Respectfully submitted,

THREE FEATHERS COMMUNICATIONS,
INC.

By: Naomi S. Travers

Howard M. Liberman

Naomi S. Travers

ARTER & HADDEN

1801 K Street, N.W.

Suite 400K

Washington, DC 20006-3101

(202) 775-7100

Its Attorneys

June 11, 1997



Federal Communications Commission
Washington, D.C. 20554

APR 2 1997

1800E3-JLB

Three Feathers Communications, Inc.
c/o Howard M. Liberman, Esq.
Arter & Hadden
1801 K Street, N.W.
Suite 400K
Washington, D.C. 20006-3101

KM Communications Inc.
c/o Jeffrey L. Timmons, Esq.
Irwin Campbell & Tannenwald, P.C.
1730 Rhode Island Avenue, N.W.
Suite 200
Washington, D.C. 20006-3101

Mr. E.C. Bowlds
Way of the Cross of Hutchinson, Inc.
69097 Hershy Circle
Port St. Lucie, Florida 34983

Hutchita Communications
c/o A. Wray Fitch, III, Esq.
Gammon & Grange
7th Floor
8280 Greensboro Drive
McLean, Virginia 22102-3807

Re: Applications for New Commercial Television Station
to Serve Hutchinson, Kansas (Channel 36)

File Nos. BPCT-950703KE
 BPCT-950824KK
 BPCT-951107KE
 BPCT-951102KH

Gentlemen:

This letter is in regard to: (1) the above-referenced application of Three Feathers Communications, Inc. (Three Feathers) for a construction permit for a new commercial television station on channel 36 at Hutchinson, Kansas; (2) the Joint Request for Approval of Settlement

Agreements between Three Feathers and KM Communications, Inc. (KM), Way of the Cross of Hutchinson, Inc. (Way of the Cross), and Hutchita Communications (Hutchita), competing applicants for channel 36; and (3) the Petition to Deny filed by Wichita Communications, the permittee of station KWCV(TV), channel 33, Wichita, Kansas, against the Three Feathers application. The settlement agreements among the Hutchinson applicants, which are unopposed, provide for the dismissal of the KM, Way of the Cross and Hutchita applications, and the payment by Three Feathers to the dismissing applicants the sums of \$200,000, \$150,000, and \$200,000, respectively.¹

We have reviewed the terms of the agreements and find that the parties have complied with the requirements of Section 73.3525, as waived by the Commission on September 15, 1995 for a period of 90 days.² The Hutchinson applicants have submitted declarations stating that their applications were not filed for the purpose of reaching a dismissal agreement, and that, apart from the settlement payment, neither the applicants nor principals have paid or will pay or receive any money or other consideration in exchange for the withdrawal of the three applications. Accordingly, we find that the Joint Request for Approval of Settlement Agreement is consistent with the Commission's rules and policies and will serve the public interest. Moreover, as discussed below, we have fully considered the matters set forth in Wichita Communication's petition to deny the Three Feathers application and conclude that there are no substantial and material questions of fact that would warrant any further inquiry.

In its petition to deny, Wichita Communications alleges that Three Feathers' application is a strike application, filed for the primary purpose of obstructing Wichita Communication's efforts to construct KWCV(TV) and forcing the sale of the construction permit to Glenn Bell, one of Three Feathers' principals, on unfavorable terms.³ In support, Wichita Communications submits the declarations of its principal, Denny Workman, and Brad Murray, the owner of the

¹ The agreement between Three Feathers and Way of the Cross also provides that Three Feathers will prepare and file an application on behalf of Way of the Cross for a noncommercial educational television station on channel *15 or *42 at Wichita, and allow one hour of airtime to Way of the Cross until six months after the grant of that application. In exchange, Way of the Cross agrees to forfeit half of its \$200,000 payment if the noncommercial application is granted within 18 months of its filing.

² See *FCC Waives Limitations on Payments*, 10 FCC Rcd 12182 (1995). The applicants signed their settlement agreements within this 90-day waiver period.

³ A strike application is one that is filed for the purpose of impeding, obstructing or delaying the grant of a competing application. *Grenco, Inc.*, 28 FCC 2d 166, 167 (1971). In *Grenco*, the Commission articulated four guidelines to be used to evaluate evidence of a motive to file a strike application: (1) the timing of the application, (2) the economic and competitive benefit occurring from the application; (3) the good faith of the applicant; and (4) the availability of other frequencies in the market. See also *Community Service Broadcasting, Inc.*, 7 FCC Rcd 5652 (1992).

tower on which it proposed at one time to mount its antenna. According to Mr. Murray, around the time Three Feathers filed its application for channel 36 at Hutchinson, Mr. Bell expressed an interest in acquiring the KWCV(TV) construction permit. Mr. Murray also stated that "Mr. Bell seemed to be aware that it would soon be necessary for Channel 33 to move" and Mr. Bell told Mr. Murray that he was using the Three Feathers application to "pin down Channel 33, so that it would be difficult, if not impossible for Mr. Workman to move Channel 33." Mr. Workman also states he spoke with Mr. Bell after Three Feathers filed its application, and that Mr. Bell told him that while he was a principal in Three Feathers' application for Hutchinson, his "ultimate desire was to have Channel 33 [in Wichita], not Channel 36 [in Hutchinson]." According to Mr. Workman, Mr. Bell also said that if he acquired the construction permit for KWCV(TV), he would do so in conjunction with Clear Channel Communications (Clear Channel), the licensee of KSAS(TV) in Wichita, and would also attempt to persuade KM to move its antenna site further away from Wichita to allow the KWCV(TV) site to be moved further north in order to improve coverage.

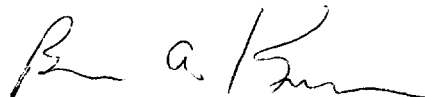
We find that Wichita Communications has failed to make a prima facie showing that Three Feathers' application for a construction permit for channel 36 at Hutchinson was filed in order to impede, obstruct or delay the construction of KWCV(TV). According to Three Feathers, it filed its application for the sole purpose of obtaining the construction permit for channel 36 and building the station. The fact that Mr. Bell preferred to buy the KWCV(TV) construction permit in Wichita, thereby avoiding the potential delays in filing a new station application and facing competing applications, does not indicate an obstructive purpose. Similarly, the fact that Three Feathers proposed to locate its facility at an existing antenna farm between Hutchinson and Wichita, which could have an impact on Wichita Communications' ability to file a subsequent modification application specifying its own preferred transmitter site, does not indicate any improper motive on Three Feathers' part. We also recognize the potential economic benefit to Three Feathers in the event its application for a construction permit at Hutchinson was successful; where a sound economic interest underlies an application, the Commission has held that a finding of strike conduct cannot be supported. *See, e.g., Kaltrim Broadcasting Co.*, 45 RR 2d 1080, 1082 (B/cast Bur. 1979); *Camden Broadcasting Co.*, 53 FCC 2d 513, 517 (1975).

We also find that Wichita Communications has failed to make a prima facie showing that Clear Channel is the real party in interest behind the Three Feathers application. The test for whether a third person is a real party in interest is whether that person has an ownership interest, or is or will be in a position to actually or potentially control the operation of the station. *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). De facto control is determined based on an analysis of the ability of the persons or entities to control a licensee's finances, personnel practices, and broadcasting. *See, e.g., Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981), *reconsideration denied*, 50 RR 2d 1346 (1982). Here, Three Feathers reported in its application that Clear Channel would provide the financing for the construction and initial operation of the station, and have an option to acquire the station. This relationship, standing alone, does not make Clear Channel a real party in interest to Three Feathers' application. *Id.* Similarly, the fact that Clear Channel was interested in financing Three Feathers' purchase of the KWCV(TV) construction permit does not indicate that Clear Channel controls or controlled Three Feathers.

Wichita Communications has presented no evidence that Clear Channel and Three Feathers will have other than an arm's length creditor-debtor relationship, or that Clear Channel would be involved in the personnel practices and broadcasting decisions relating to Three Feathers' station. Thus, based upon the record before us, we conclude that Wichita Communications has presented no credible evidence that Clear Channel is the real party in interest behind the Three Feathers application for a construction permit at Hutchinson.

Accordingly, the Joint Application for a Settlement Agreement IS GRANTED; and the above-captioned applications of KM Communications, Inc., Hutchita Communications, Inc. and Way of the Cross of Hutchinson, Inc. ARE DISMISSED, with prejudice; the Petition to Deny filed by Wichita Communications IS DENIED; and the above-captioned application of Three Feathers Communications, Inc., for a new commercial television station on channel 36 at Hutchinson, Kansas, IS GRANTED.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. A. Kreisman', written in a cursive style.

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

cc: Donald E. Martin, Esq.



United States of America
FEDERAL COMMUNICATIONS COMMISSION
TELEVISION BROADCAST STATION
CONSTRUCTION PERMIT

Official Mailing Address:

THREE FEATHERS COMMUNICATIONS, INC.
2750 S. 167TH WEST
GODDARD, KS 67052

Authorizing Official:

Clay C. Pendarvis
Chief, TV Branch
Video Services Division
Mass Media Bureau

Grant Date: 4/2/97

Call Sign: 950703KE

This permit expires 3:00 a.m.
local time, 24 months after
grant date specified above.

Permit File No.: BPCT-950703KE

ORIGINAL

Subject to the provisions of the Communications Act of 1934, as amended, subsequent acts and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to the conditions set forth in this permit, the permittee is hereby authorized to construct the radio transmitting apparatus herein described. Installation and adjustment of equipment not specifically set forth herein shall be in accordance with representations contained in the permittee's application for construction permit except for such modifications as are presently permitted, without application, by the Commission's Rules.

This permit shall be automatically forfeited if the station is not ready for operation within the time specified (date of expiration) or within such further time as the Commission may allow, unless completion of the station is prevented by causes not under the control of the permittee. See Sections 73.3598, 73.3599 and 73.3534 of the Commission's Rules.

Equipment and program tests shall be conducted only pursuant to Sections 73.1610 and 73.1620 of the Commission's Rules.

Name of Permittee:

THREE FEATHERS COMMUNICATIONS, INC.

Station Location:

KS-HUTCHINSON

Frequency (MHz): 602.0 - 608.0

Carrier Frequency (MHz): 603.26 Visual 607.76 Aural

Channel: 36

Hours of Operation: Unlimited

Transmitter location (address or description):

6.44 KM South and 0.375 East of Halstead, Harvey County, KS

Transmitter: Type Accepted. See Sections 73.1660, 73.1665 and 73.1670 of the Commission's Rules.

Antenna type: (directional or non-directional): Directional

Description: SWR, INC. SWFPS32PNSP/36

Beam Tilt: 0.60 Degrees Electrical

Major lobe directions (degrees true): 140.0 300.0

Antenna Coordinates: North Latitude :	37	56	23
West Longitude :	97	33	42

Transmitter output power.....: As required to achieve authorized ERP

Maximum effective radiated power (PEAK): 3470.0 kW
: 35.4 DBK

Height of radiation center above ground.....: 309 Meters

Height of radiation center above mean sea level.: 733 Meters

Height of radiation center above average terrain: 733 Meters

Antenna structure registration number: none

Overall height of antenna structure above ground
(including obstruction lighting if any): 338 Meters

Obstruction marking and lighting specifications for antenna structure:

It is to be expressly understood that the issuance of these specifications is in no way to be considered as precluding additional or modified marking or lighting as may hereafter be required under the provisions of Section 303(q) of the Communications Act of 1934, as amended.

PARAGRAPH A . . , FCC FORM 715-A (MAY 1985):

There shall be installed at the top of the antenna structure a white capacitor discharge omnidirectional light which conforms to FAA/DOD Specification L-856, High Intensity Obstruction Lighting Systems. This light shall be mounted on the highest point of the structure. If the antenna or other appurtenance at its highest point is incapable of supporting the omnidirectional light, one or more such lights shall be installed on a suitable adjacent support with the lights mounted not more than 20 feet below the tip of the appurtenance. The lights shall be positioned so as to permit unobstructed viewing of at least one light from aircraft at any normal angle of approach. The light unit(s) shall emit a beam with a peak intensity around its periphery of approximately 20,000 candelas during daytime and twilight, and approximately 4,000 candelas at night.

PARAGRAPH B . . , FCC FORM 715-A (MAY 1985):

There shall be installed at the top of the skeletal or other main support structure three or more high intensity light units which conform to FAA/DOD Specification L-856 High Intensity Obstruction Lighting Systems. The complement of units shall emit a white high intensity light and produce an effective intensity of not less than 200,000 candelas (daytime) uniformly about the antenna structure in the horizontal plane. The effective intensity shall be reduced to approximately 20,000 candelas at twilight, and to approximately 4,000 candelas at night. The light units shall be mounted in a manner to ensure unobstructed viewing from aircraft at any normal angle of approach, so that the effective intensity of the full beam is not impaired by any structural member of the skeletal framework. The units will normally be adjusted so that the center of the beam is in the horizontal plane.

PARAGRAPH E . . , FCC FORM 715-A (MAY 1985):

At the approximate one-fourth, one-half and three-fourths levels of the skeletal tower there shall be installed three or more high intensity light units which conform to FAA/DOD Specification L-856, High Intensity Obstruction Lighting Systems. The complement of units shall emit a white high intensity light and produce an effective intensity of not less than 200,00 candelas (daytime) uniformly about the antenna structure in the horizontal plane. The effective intensity shall be reduced to approximately 20,000 candelas at twilight, and to approximately 4,000 candelas at night. The light units shall be mounted in a manner to ensure unobstructed viewing from aircraft at any normal angle of approach, so that the effective intensity of the full beam is not impaired by any structural member of the skeletal framework. The normal angular adjustment of the beam centers above the horizontal shall be three degrees at the one-fourth level, two degrees at the one-half level and one degree at the three-fourths level.

PARAGRAPH H . . , FCC FORM 715-A (MAY 1985):

All lights shall be synchronized to flash simultaneously at 40 pulses per minute. The light system shall be equipped with a light sensitive control device which shall face the north sky and cause the intensity steps to change automatically when the north sky illumination on a vertical surface is as follows:

1. Day to Twilight: Shall not occur before the illumination drops to 60 footcandles, but shall occur before it drops to 30 footcandles.
2. Twilight to Night: Shall not occur before the illumination drops to 5 footcandles, but shall occur before it drops to 2 footcandles.
3. Night to Day: The intensity changes listed in 1. and 2. above shall be reversed in transitioning from the night to day modes.

PARAGRAPH I . . , FCC FORM 715-A (MAY 1985):

During construction of an antenna structure for which high intensity lighting is required, at least two lights shall be installed at the uppermost part of the structure. In addition, at each level where permanent obstruction lighting will be required, two similar lights shall be installed. Each temporary light shall consist of at least 1,500 candelas (peak effective intensity), synchronized to flash simultaneously at 40 pulses per minute. Temporary lights shall be operated continuously, except for periods of actual construction, until the permanent obstruction lights have been installed and placed in operation. Lights shall be positioned to ensure unobstructed viewing from aircraft at any normal angle of approach. If practical, the permanent obstruction lights may be installed at each level as the structure progresses. NOTE: If battery operated, the batteries should be replaced or recharged at regular intervals to preclude failure during operation.

Paragraph A modified to require use of L-865 Medium Intensity Lights in lieu of L-856. Paragraphs A,B, and E modified to require a peak intensity of approximately 2000 candelas at night in lieu of 4000.

Special operating conditions or restrictions:

1. Grant of this authorization is conditioned on the outcome of the digital television (DTV) rule making proceeding in MM Docket No. 87-268. To the extent that the station's Grade B contour or potential for causing interference is extended into new areas by this authorization, the Commission may require the facilities authorized herein to be reduced or modified.

*** END OF AUTHORIZATION ***